

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>Dale Giles</b>		)	
	Claimant	)	
VS.		)	
		)	Docket No. 166,241
<b>Crouse Contract Carriers</b>		)	
	Respondent	)	
AND		)	
		)	
<b>Liberty Mutual Insurance Co.</b>		)	
	Insurance Carrier	)	

**ORDER**

**ON** the 3rd day of May, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Steven J. Howard, dated March 22, 1994, came on for oral argument.

**APPEARANCES**

Claimant appeared by and through his attorney, J. Paul Maurin, III of Kansas City, Kansas. Respondent and insurance carrier appeared by and through their attorney, Stephanie Warmund of Overland Park, Kansas. There were no other appearances.

**RECORD**

The record considered by the Appeals Board is the same as that specifically set forth in the Award of the Administrative Law Judge.

**STIPULATIONS**

The stipulations of the parties are the same as those specifically set forth in the Award of the Administrative Law Judge.

### **ISSUES**

The Administrative Law Judge found that claimant sustained an accidental injury arising out of and in the course of his employment with the respondent on July 1, 1991, and injured his left knee and ankle which was compensable under the Workers Compensation Act. The respondent and insurance carrier request a review by the Appeals Board and contend that the Administrative Law Judge erred in his finding that claimant sustained an accidental injury arising out of and in the course of his employment and in his finding that the respondent had failed to prove prejudice due to claimant's failure to provide timely notice. Those are two issues now before the Appeals Board.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire record, the Appeals Board finds:

(1) The claimant sustained an accidental injury arising out of and in the course of his employment with the respondent on July 1, 1991, when roofing material was being unloaded from his truck in Wichita, Kansas. The Appeals Board finds the testimony of witness Britt Morgan persuasive on this issue. On the date of accident, Mr. Morgan was the foreman for Mahaney Roofing of Wichita, Kansas, and testified that he saw claimant immediately after roofing material fell from the truck and struck claimant on the leg. Mr. Morgan saw that claimant was pale and shaken, saw abrasions on claimant's shin, and offered to take him to the emergency room. An employee of Mahaney Roofing, Charles Tucker, also testified and corroborated Mr. Morgan's testimony. These two witnesses are disinterested third parties and, as such, are credible and persuasive.

(2) As found by the administrative law judge, claimant failed to give timely notice required by K.S.A. 44-520. Also, as determined by the administrative law judge, there has been no showing by the respondent of prejudice caused by the failure of claimant to provide such notice.

Witnesses to the accident were located and their testimony taken. There has been no prejudice to respondent pertaining to its ability to investigate this claim. Regarding the medical treatment provided, respondent acknowledges that it was necessary and appropriate. Also, there is no allegation that claimant's failure to provide timely notice resulted in additional injury or disability.

Respondent cites Wietharn v. Safeway Stores, Inc., 16 Kan. App.2d 188, rev. denied 250 Kan. 808, 820 p.2d 719 (1991), as relevant. However, we believe the controlling decision to be Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978) in which the Kansas Supreme Court states at page 409 of its decision:

"We have repeatedly held that lack of notice to the employer, which notice is required by K.S.A. 44-520, does not bar a claim for workers' compensation unless the employer has been prejudiced thereby. (Citations omitted.) Before a workers' compensation claim, otherwise valid, should be denied because of lack of the notice required by K.S.A. 44-520 the employer must successfully bear the burden of proving prejudice from the lack of notice. (Citation omitted.) Whether an employer

is prejudiced by lack of notice is a question of fact to be determined by the trial court. (Citation omitted.)"

The Court in Pike, continues on page 409 and 410:

"A court when called on to inquire into the existence of prejudice from a defect in or lack of the notice required by K.S.A. 44-520 should consider that the purpose of this notice statute is to afford the employer an opportunity to investigate the accident and to furnish prompt medical treatment. (Citation omitted.) Prejudice may arise if claimant's injury is aggravated by reason of the inability of the employer to provide early diagnosis and treatment. Prejudice may also result if the employer is substantially hampered in making an investigation so as to prepare a defense. (Citation omitted.)"

Under the facts presented, the Appeals Board finds that the respondent and insurance carrier have failed to prove prejudice by reason of lack of notice of the accident, and that the award of Administrative Law Judge Steven J. Howard dated March 22, 1994, should be affirmed in all respects.

(3) The Appeals Board adopts the findings and conclusions set forth by Administrative Law Judge Steven J. Howard in his award of March 22, 1994, that are not inconsistent with the findings and conclusions specifically set forth herein.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated March 22, 1994, should be, and hereby is, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 1994.

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BOARD MEMBER

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BOARD MEMBER

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**BOARD MEMBER**

cc: J. Paul Maurin, II, Attorney for Claimant, PO Box 1216, Kansas City, KS 66117  
Stephanie Warmund, Attorney for Respondent, 10561 Barkley, Suite 410, Overland  
Park, KS 66212  
Steven J. Howard, Administrative Law Judge  
George Gomez, Director